

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 HENRI WETSELAAR, MD, *et al.*,

14 Defendants.
15

Case No. 2:11-CR-00347-KJD-CWH

ORDER

16 Before the Court is Defendants Henri Wetselaar's and David A. Litwin's ("Defendants")
17 Objections to Magistrate's Order Denying Defendants' Request for Franks Hearing (#112). The
18 United States provided an anemic response (#113), and Defendants replied (#114). The Findings and
19 Recommendation objected to is #109. The Findings and Recommendation relate to the Motion for a
20 Franks hearing contained in Defendants' Omnibus Motion (#65), Motion for Franks hearing (#95),
21 and Re-Filed Motion for Franks hearing (#99).

22 **I. Background**

23 The factual and procedural background of this case is familiar to the Court and to the parties,
24 and so will not be treated in depth here. However, a few salient points should be noted. Among other
25 challenges, Defendants protest the search of their possessions at 24/7, a private vault operation. The
26 affidavits and the warrant reference the numbered vaults assigned to Defendants. However, prior to

1 the warrant application, the United States was aware that 24/7 employees had removed the metal
2 liners which actually contain the items within the vault, and deposited them in the floor vault. It was
3 these unnumbered metal liners, and not the now empty numbered doors which were searched upon
4 execution of the warrant.

5 I. Legal Standard

6 This Court has conducted a *de novo* review of the record in this case in accordance with 28
7 U.S.C. § 636(b)(1) and Local Rule IB 3-2.

8 A defendant qualifies for a Franks hearing “if the defendant can make a substantial
9 preliminary showing that (1) the affidavit contains intentionally or recklessly false statements or
10 misleading omissions, and (2) the affidavit cannot support a finding of probable cause without the
11 allegedly false [or omitted] information. United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir.
12 2000).

13 The Court notes that this is a high hurdle. First “[t]here is, of course, a presumption of
14 validity with respect to the affidavit supporting the search warrant. Franks v. Delaware, 438 U.S.
15 154, 171 (1978). With that presumption in place, Defendants must make a *substantial* showing that
16 the affidavits contain *intentionally or recklessly false statements*. However, not even this showing is
17 enough. Defendants must also demonstrate that the affidavits would not support a finding of
18 probable cause *but for* the false information.¹ At the outset, the Court notes that Defendants have
19 been less than thorough, causing a host of issues including violation of Special Order 109 III(F)(4)
20 and time-barring several of their allegations (#109; 2-3).

21 ///

22 ///

23 ///

24
25 ¹Defendants correctly assert that probable cause must be evaluated after all relevant misrepresentations and
26 omissions have been rectified. However, a cursory reading of the Findings and Recommendation (#109) shows that this is
precisely the standard applied there.

1 II. Norris' Affidavits

2 A. \$3.6 Million versus \$1.8 Million

3 Defendants argue that the \$3.6 million of income allegedly generated by Dr. Wetselaar is
4 unsupported by the financial records cited in Agent Norris' Affidavit (#68 Ex. 8). However, as noted
5 by the Magistrate Judge:

6 Norris did not state that his financial analysis was intended to prove the \$3.6 million
7 figure. Instead, Norris highlights specific financial behaviors he believed to be
8 consistent with methods used by controlled substance diverters to conceal the nature
9 of their illegal activity. Also, Defendants do not provide the Court with any financial
statements revealing an inconsistent gross receipts figure or the alleged business
records that do not support such revenue.
10 (#109; 8).

11 Rather than correct these shortcomings, Defendants simply iterate the same insufficient
12 arguments. Defendants appear to be proceeding from the assumption that the financial analysis in
13 Agent Norris' affidavit covers all of Dr. Wetselaar's income, capping it at \$1.8 million. Precisely the
14 opposite contention appears to be made by the Government who both conducted the investigation
15 and provided the affidavits. If Defendants wish to successfully challenge the \$3.6 million figure, they
16 must actually make a substantial showing that the amount is 1) false, 2) due to intentional or reckless
17 behavior, and 3) alters probable cause analysis when summed with all other relevant
18 misrepresentations or omissions. Defendants fail to do all three despite the Magistrate Judge's prior
analysis.

19 B. Probable Cause

20 In Defendants' "ideal" affidavits from Mr. Norris, the \$3.6 Million figure is reduced to \$1.8
21 Million,² and they reference the removed and unnumbered metal liners rather than the "numbered
22 doors" which previously contained the liners. The Court finds that these distinctions would have
23 made no material difference in the probable cause analysis leading to the contested searches and
24

25 ²Plaintiff failed to show that the allegation was intentionally or recklessly false, or even false at all, and so the
26 \$3.6 million figure remains. However, even if the reduced figure is used, probable cause remains when all relevant
misrepresentations and omissions are summed.

1 seizures. Accordingly, the Court affirms and adopts the Magistrate Judge's Findings and
2 Recommendations as to Agent Norris' Affidavits consistent with the above analysis.³

3 III. Still's Affidavit

4 Defendants acknowledge that nine of their twelve alleged misrepresentations and omissions
5 are untimely raised (#112; 16). The Magistrate Judge found the petition procedurally improper, and
6 Defendants' explanation for tardiness unpersuasive (#109; 3). Nevertheless, Defendants boldly assert
7 that the Magistrate Judge "must have accepted" their arguments as "the Court then proceeded to the
8 merits" (#112; 16). Defendants are incorrect. The Magistrate Judge was merely being thorough and
9 assisting this Court in its analysis, an effort which is greatly appreciated.

10 This Court finds that all of Defendants' alleged misrepresentations or omissions are time-
11 barred except items seven (prescription monitoring program), ten (urinalysis), and twelve (initial
12 patient exams). However, even if all twelve assertions were proper, probable cause would still exist
13 for the contested searches.

14 A. Number Seven; Prescription Monitoring Program

15 Defendants offer no meaningful evidence that omission of Dr. Wetselaar's orders for
16 Prescription Monitoring Program Reports was reckless or intentional. As the Magistrate Judge
17 correctly noted "it is unclear how a single check of a patient's prescription history performed before
18 Dr. Wetselaar prescribed medication destroys the probable cause finding related to Dr. Wetselaar's
19 behavior after reading the reports" (#109; 19). Further, as noted by the Magistrate Judge, even when
20 the PMP Reports showed pain prescriptions from another physician, Dr. Wetselaar prescribed
21 additional drugs. Accordingly, this omission is irrelevant, and neither reckless nor intentional.

22 ///

23 ///

24
25 ³While the Court will address substantive arguments as to errors made by the Magistrate Judge, strained
26 misreadings of the Findings and Recommendations do not merit analysis. Defendants' burden is to make a "substantial
preliminary showing" not to invent irrelevant errors.

1 B. Number Ten; Urinalysis of Undercover Agent

2 Defendants offer no meaningful evidence that omission of Dr. Wetselaar's orders for a
3 urinalysis of one of the undercover agents was reckless or intentional. Dr. Wetselaar appears to have
4 ordered a single urinalysis for one of the undercover agents. Again, such an isolated event, even
5 when considered with all other such omissions, is of so little moment that the Court cannot consider
6 it a reckless or intentional omission without substantial further evidence.

7 C. Number Twelve; Initial Patient Examinations

8 Defendants allege that evidence of Dr. Wetselaar conducting legitimate physical
9 examinations on the undercover agents was recklessly omitted. In so doing, Defendants reference
10 various practices engaged in by Dr. Wetselaar, ostensibly as evidence of legitimacy. However,
11 Defendants fail to support their allegation that the examinations were omitted intentionally or
12 recklessly, especially given the dramatically reduced value of this evidence given the prescriptions
13 written by Dr. Wetselaar without any physical exam whatever. Accordingly, Defendants fail to make
14 a substantial preliminary showing that the affidavit contains intentionally or recklessly false
15 statements or misleading omissions.

16 D. Probable Cause

17 The Court agrees with the Magistrate Judge and finds that even were the above "omissions"
18 intentional or reckless, they are insufficient to alter probable cause analysis given the depth and
19 breadth of the incriminating evidence. Accordingly, Defendants fail the second step: making a
20 substantial preliminary showing that the affidavit cannot support a finding of probable cause without
21 the allegedly false information.

22 E. The Barred Allegations

23 As the remaining allegations are time-barred the Court need not address them. However, it
24 appears to the Court that few, if any of alleged omissions or misrepresentations were reckless or
25 intentional. The Court further agrees with the Magistrate Judge that even if the Court were to find
26 every alleged misrepresentation or omission reckless or intentional, the outcome would be the same.

1 Even when all alleged false statements are excised from the affidavits and all alleged misleading
2 omissions are added to the affidavits, the Court finds that there is probable cause to issue the search
3 warrants.

4 IV. Conclusion

5 **IT IS HEREBY ORDERED** that the Magistrate Judge's Findings and Recommendations
6 (#109) are **ADOPTED AND AFFIRMED** in accordance with the above discussion. Accordingly,
7 Defendants' Motion for Franks hearing (#95) and Re-Filed Motion for Franks hearing (#99) are
8 **HEREBY DENIED**. Further, Defendants' Omnibus Motion (#65) is **DENIED** to the extent it is a
9 petition for a Franks hearing.

10 DATED this 25th day of September 2013.

11
12 

13 _____
14 Kent J. Dawson
15 United States District Judge
16
17
18
19
20
21
22
23
24
25
26